STATE OF MICHIGAN
SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, a Michigan Non-Profit Corporation,
Plaintiff/Appellant,

Lower Docket Case No.
00-2512-CL-L

-vs-

Court of Appeals Docket No.
234037

KATHLEEN M. WILBUR, Director of the Michigan Department of Consumer & Industry Services and NORMAN W. DONKER, Midland County Prosecuting Attorney,
Defendants/Appellees,
and

MICHIGAN STATE BUILDING & CONSTRUCTION TRADES COUNCIL,
Intervenor/Defendant/Appellee,
and

MICHIGAN CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Michigan Corporation, MICHIGAN MECHANICAL CONTRACTORS ASSOCIATION, a Michigan Corporation, and MICHIGAN CHAPTER OF THE SHEET METAL AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, a Michigan Corporation,
Intervenors/Defendants/Appellees,
and

MICHAEL D. THOMAS, Saginaw County Prosecuting Attorney,
Intervenor/Appellee.

124835

PLAINTIFF/APPELLANT'S CONSOLIDATED REPLY IN RESPONSE TO DEFENDANT/APPELLEE'S AND INTERVENOR/DEFENDANTS/APPELLEES' BRIEFS IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

INTRODUCTION

Plaintiff/Appellant, Associated Builders and Contractors, Saginaw Valley Area Chapter ("ABC"), has filed an Application for Leave to Appeal to this court, alleging that the Michigan Court of Appeals committed error in finding that this case presents no case or controversy. In response to ABC's application, Defendant/Appellee, Kathleen M. Wilbur ("Defendant Wilbur"), and Intervenor/Defendant/Appellees, Michigan State Building And Construction Trades Council, and the Michigan Chapter of the National Electrical Contractors' Association, Inc., Michigan Mechanical Contractors Association, and the Michigan Chapter of the Sheet Metal Air Conditioning Contractors National Association (collectively "Intervenors") filed briefs in opposition to ABC's Application for Leave to Appeal.[1] Defendants' responses to ABC's Application for Leave to Appeal essentially present the same arguments, therefore, for purposes of ABC's reply, ABC has consolidated its response into this one reply brief. As their opposition to ABC's application is wholly without merit, ABC's Application for Leave to Appeal should be granted by this court.

ARGUMENT

I. ABC has Established the Existence of a Case or Controversy due to its Legitimate Interest in the Prevailing Wage Act and the Need for Adjudication to Guide ABC Members' Future Actions; Therefore, the Court of Appeals Committed Error in Dismissing this Case

In the Defendants' briefs in opposition to ABC's Application for Leave to Appeal, the Defendants have continued their myopic presentation of the law, completely ignoring the abundant case law which clearly demonstrates that this case does, in fact, present a case or controversy which is suitable for a declaratory action. The Defendants narrowly focus upon the

[1] Defendant, Kathleen Wilbur, and Defendant/Intervenors will be referenced collectively as "defendants" through out this brief.

"threat of imminent prosecution" as providing the only possible means for obtaining declaratory relief. Case law demonstrates that Defendants are simply incorrect. As the Court of Appeals also relied upon this standard in its evaluation of this case, the Court of Appeals has committed error and, therefore, Supreme Court review is warranted.

The Defendants repeatedly attempt to minimize the issues in this case by dismissively miscasting ABC's injuries as "hypothetical" and, therefore, unworthy of attention by this Court. While it is true that a declaratory action is not the appropriate vehicle to assess claims of hypothetical injury,[2] the Defendants nonetheless confuse the concept of "hypothetical injury" with the ability of a plaintiff to seek judicial guidance to govern its future actions. Indeed, the Michigan Supreme Court has held that "[o]ne test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights." Bane v Township of Pontiac, 343 Mich 481 (1955). See also Updegraff v Attorney General, 298 Mich 48 (1941); Grocer's Dairy Co. v Dept. of Agriculture Director, 377 Mich 71 (1966); Arlan's Department Stores, Inc. v Attorney General, 374 Mich 70 (1964); Levy v Pontiac, 331 Mich 100 (1951); Carolene Products Co. v Thompson, 276 Mich 172 (1963); National Amusement Co. v Johnson, 270 Mich 613 (1935); Village of Breedsville v Columbia Township, 312 Mich 47 (1945); Rott v Standard Accident Ins. Co., 299 Mich 384 (1941). By assuming that all cases lacking "imminent prosecution" necessarily present nothing more than "hypothetical injury," the Defendants have completely ignored the availability of a declaratory action to guide future conduct standard and, thus, have

[2] *See* BCBSM v Governor, 422 Mich 1 (1985) (*holding* that declaratory action is not appropriate when there is no indication that the parties were at odds as to the interpretation of the statute); *see also* Recall Blanchard Committee v. Secretary of State, 146 Mich App 117 (1985) (*holding* that no controversy existed when plaintiffs admittedly had not presented any petition signatures for verification).

disregarded decades of applicable case law that clearly establishes ABC's right to prosecute this declaratory case or controversy.

The case of Sterling Secret Service, Inc. v Dept of State Police, 20 Mich App 502 (1969), is yet one more example of a long list of cases that ABC has put forward in establishing that imminent prosecution is not required before commencing a declaratory action. In Sterling, a case remarkably similar to the present matter, a private security agency challenged the constitutionality of a new statute regulating private security agencies. Sterling at 508. The Michigan Department of State Police, the state agency charged with enforcement of the new rules, sent a form letter to all security agencies warning them that non-compliance with the new rules was a misdemeanor, subjecting the licensee to arrest and prosecution. Sterling at 513. The plaintiff immediately commenced a declaratory action seeking permanent injunctive relief against enforcement of the new rules, *in spite of the fact that the rules had yet to be enforced against the plaintiff, and without any threat of imminent prosecution.* Sterling at 511. The trial court found the case to be appropriately before the court as a declaratory action.

Evaluating the matter on appeal, the Court of Appeals found that a declaratory action was an appropriate vehicle for bringing the issue before the courts. The Court of Appeals explained:

> This appeal presents a preliminary procedural question – namely, the availability of declaratory relief. The trial judge was of the opinion that:
>
> > "Plaintiffs are legitimately interested in maintaining their business without fear or threat of losing their license, events which may occur if plaintiff fails to comply . . . with the proposed rules. In such circumstances, a declaratory judgment as to whether the proposed rules are unreasonable and invalid because in excess of the authority delegated under the security guard act is not inappropriate.
>
> We agree.

Sterling at 508-09. The Court also rejected the defendant's argument that the plaintiff had failed to present a "contested case," stating:

> This would require that plaintiff first obey the department's rules. Thereafter, after revocation of its license, or upon criminal prosecution, plaintiff could secure a judicial determination of the validity of such rules. We likewise decline to embrace this argument. To require the plaintiff to proceed by way of a "contested case," thereby risking loss of its license, would be contrary to the very purpose for which declaratory judgment proceedings are a part of our judicial procedures.

Sterling at 511. The Court concluded by stating

> [I]n the present case, it clear that an actual controversy . .. exists between the parties to the suit. The rules have been published; the department has manifested an intent to enforce its new rules. Furthermore, as noted by the trial judge, plaintiff has a legitimate interest in maintaining its business without fear or threat of losing its license.
>
> Under the circumstances, we conclude that plaintiff properly sought declaratory relief. Only by an action for declaratory judgment could plaintiff obtain a "present adjudication as a guide for plaintiff's future conduct in order to preserve [its] legal rights."

Sterling at 512-13 (citations omitted).

The Sterling case is directly applicable to the present matter, and makes crystal clear that ABC has, in fact, presented a case or controversy which is suitable for review by the court. As an initial matter, it should be noted that ABC has not been permitted to engage in any discovery at this point, therefore, the facts of this matter are limited at this time. However, even with this limitation, the analogy between the Sterling case and the present matter is abundantly apparent. For instance, the plaintiff in the Sterling case sought to challenge a statute which, if enforced, could prospectively govern his business operations as a private investigator. In the present case, ABC is challenging the prevailing wage statute which regulates the wages, benefits and work practices of its contractor members who have not only bid on prevailing wage jobs, but who have actually performed prevailing wage work subject to the regulation of the Prevailing Wage Act.

(*See* ABC's Appl., Exs. F, G) The statute at issue in Sterling contained criminal penalties for violation of the statute; similarly, the Prevailing Wage Act contains criminal sanctions for violation, and ABC members have actually been accused by the Michigan Department of Consumer and Industry Services ("CIS") of breaking the law. (*See* ABC's Appl., Exs. F, G)

Furthermore, the Sterling plaintiffs received a correspondence from the enforcing authority regarding their intent to enforce the statute. Likewise, ABC members have been contacted by the CIS and have been accused of breaking the law, and have been informed that the case has been referred to the prosecuting attorney's office for criminal investigation. (*See* ABC's Appl., Exs. F, G) The Sterling plaintiffs were justified in assuming that the enforcing authority would, in fact, enforce the statute in question, just as ABC members are justified in presuming that the defendants will enforce the Prevailing Wage Act. *See* Strager v Wayne County Prosecuting Attorney, 10 Mich App 166, 173 (1968). Additionally, the plaintiff in Sterling challenged the validity of the statute in question through the utilization of a declaratory action, as ABC has done in the present case.

Perhaps, most importantly, the plaintiff in the Sterling case brought his declaratory action *before any prosecution had been commenced, or had even been directly threatened*, for violation of the statute in question. The Sterling plaintiff was aware of the criminal penalties due to the receipt of a form letter from the Michigan State Police, however, *there was no indication whatsoever that the Sterling plaintiff had violated, or intended to violate, the statute in question or that it faced any threat of "imminent prosecution."* Likewise, ABC is aware of the criminal penalties associated with the Prevailing Wage Act through the language of the Prevailing Wage Act itself, coupled with the CIS enforcement activity. (*See* ABC's Appl., Exs. F, G) Additionally, ABC members have been informed that the CIS has referred alleged violations of

the Prevailing Wage Act to local prosecuting attorneys for possible criminal prosecution.[3] (*See* ABC's Appl., Exs. F, G) Indeed, the CIS refers prevailing wage investigations so routinely to local prosecuting attorneys, that it has, in fact, developed a form letter for instigating criminal prosecutions. ((*See* ABC's Appl., Ex. H) Therefore, in accordance with the holding of the Sterling case, *ABC need not show that its members face "imminent prosecution" in order to establish a case or controversy sufficient to maintain a declaratory action.* Rather, both the Sterling plaintiffs and ABC have a "legitimate interest in maintaining [their] business[es] without fear or threat of losing [their] license." Sterling at 513. The Defendants' insistence upon this requirement, and the Court of Appeals' reliance upon this fact, is clear error, and requires that ABC's Application for Leave to Appeal be granted.

As with the defendants in the Sterling case, the Defendants in the present case have attempted to make ABC jump through fictitious and unnecessary legal hoops. The Defendants would have ABC members willfully violate the Prevailing Wage Act and face prosecution before a court would be permitted to provide any direction as to the validity of the statute in question. Such a position completely disregards the stated purpose of the declaratory action, and subjects ABC members to unnecessary risk of criminal prosecution and potential debarment for public works construction projects.

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[3] Furthermore, as with the Sterling case, the Defendants' position subjects the Plaintiff to possible license sanctions should they willfully choose to violate the Prevailing Wage Act simply to get this matter before the Court. As one of her first actions as Governor, Jennifer Granholm signed Executive Order 2003-1, entitled "Procurement of Goods and Services from Vendors in Compliance with State and Federal Law." This Executive Order provides that any vendor may be disqualified from participation in state contracts if the vendor violates any state or federal law. Thus, an ABC member who violates the Prevailing Wage Act may be prohibited from bidding on any state construction projects in the future. According to the Defendants' logic, ABC members are also faced with a "Hobson's choice": attempting to comply with a statutory provision which they cannot understand, or, in the alternative, violating the act, incurring criminal penalties, and risking being barred from state projects simply so that ABC members can file a declaratory action to receive guidance as to the prevailing wage act's application. Defendants' position is simply nonsensical, and is completely contrary to the purposes of the declaratory action, which is " . . . to make courts more accessible to interested parties." Kalamazoo at 517.

The Sterling case is just one of many cases which make absolutely clear that ABC has established a case or controversy sufficient to maintain a declaratory action in this case. As previously explained through ABC's briefs, Strager v Wayne County Prosecuting Attorney, 10 Mich App 166 (1968) and Kalamazoo Police Supervisors' Association v City of Kalamazoo, 133 Mich App 513 (1983), both fully support ABC's position in this case. The Defendants' desperate attempts to distinguish and side-step the controlling application of these cases raise serious questions concerning the legitimacy of their arguments and/or their understanding of the case and controversy requirement.[4] The Defendants' treatment of Strager and Kalamazoo, as well as the Court of Appeals' complete disregard of those same cases,[5] clearly demonstrates the Court of Appeals' and the Defendants' continued confusion and misapplication of the threat of imminent prosecution as the only possible means for obtaining declaratory relief, thus rendering all other injuries "hypothetical" and completely ignoring the fact that "one test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights." Kalamazoo at 518.

[4] Again, it is important to note that none of the Defendants appealed to the Michigan Court of Appeals, Circuit Court Judge Ludington's very well reasoned opinion which found that ABC had presented a valid case under MCR 2.605, and that it had alleged facts and identified existing law sufficient to stave off summary disposition as to its unlawful delegation claim. The Judge did, however, grant summary disposition to the Defendants and Intervenors on ABC's vagueness claim. The Intervenors, but not the Defendants, appealed the denial of summary judgment on the unlawful delegation claim, and ABC cross-appealed the dismissal of its vagueness claim. However, none of the parties appealed Judge Ludington's decision that this case presented an actual case or controversy. Upon review by the Court of Appeals, the Court of Appeals addressed the issue of a case or controversy *sua sponte*, without notice to the parties, and without the benefit of briefing or argument on the issue.

[5] In its *per curiam* Opinion dismissing this matter, the Court of Appeals did not even bother to address the Strager and Kalamazoo cases, *supra*, in spite of the fact that those cases are directly applicable to the present case, as they both address the case or controversy issue in the context of a criminal statute and a declaratory action. Instead, the Court of Appeals inexplicably relied upon a variety of cases of dubious merit to this issue, as none of the cases cited by the Court of Appeals involve a statute with the possibility of criminal prosecution as a penalty for violation. Thus, the Court of Appeals apparently shares the Defendants' complete misunderstanding of the issues involved in this case, a problem which no doubt could have been prevented had the Court of Appeals requested briefing on the issue before rendering its ill conceived decision in this case.

For example, the Defendants' attempt to distinguish Strager by making the absurd argument that ". . . the Court in Strager did not rely upon the abstract belief that public officials will do their duty to create an actual controversy, but on the imminent harm created by the prosecutor's explicit threat to arrest the Plaintiff for failing to comply with an investigation . . . ." Intervenors' brief in opposition, p 11. However, even a cursory reading of the Strager case easily dispels Intervenors' position and reinforces ABC's reliance on the Strager case as supporting a finding of a case or controversy in the present matter.

In Strager, to support its finding that the case was appropriate for declaratory relief, the Court of Appeals explicitly stated "[t]he plaintiff may justifiably assume public officials may do their duty." Strager at 179. Immediately following this statement, the Court of Appeals explained the proper standard in a footnote:

> "The danger of a criminal penalty attached by law to the performance of an act affords those affected the necessary legal interest in a judgment raising the issue of validity, immunity, or status. ***The threat to enforce the statute hardly seems necessary, for public officials are presumed to do their duty.*** The Plaintiff need only show that his position is jeopardized by the statute." Borchard, Declaratory Judgments (2d ed, 1941) p. 66.

Strager at FN 11, p 179 (emphasis added). Thus the Strager court has made clear that "imminent prosecution" is not necessary to prosecute a declaratory action.

Contrary to the Defendants' assertions, ABC is not relying upon Strager for the "abstract belief" that public officials will do their duty to create a case or controversy. Rather, it is ABC's position that Strager, as well as Sterling, clearly demonstrate that a plaintiff need not wait until prosecuted or even directly threatened with prosecution before instituting a declaratory action. According to Strager, it is sufficient for ABC members to act upon their knowledge that the Prevailing Wage Act provides criminal sanctions for non-compliance, that the CIS investigates complaints regarding violation of the Prevailing Wage Act and that CIS has, in fact, referred

cases to prosecuting attorneys for possible prosecution. (*See* ABC's Appl., Exs. F, G) Defendants' misleading characterization of the Strager case is simply another intellectually disingenuous attempt to divert this court's attention from the true standard to be utilized in this case.

The true standard to be utilized in evaluating this declaratory action was once again succinctly and explicitly stated in Kalamazoo Police Supervisors' Association v City of Kalamazoo, 130 Mich App 513 (1983), wherein the court stated that "[i]t is the general rule of this state that a case or actual controversy exists where the parties seek to determine the applicability of a penal statute to the performance of their business or trade." Kalamazoo at 517. The Defendants tap dance all around the holding of Kalamazoo trying to explain why Kalamazoo should not apply to this case, *see* Intervenors' brief in opposition, p 12. However, it is obvious that the Kalamazoo case does, in fact, apply to the determination of the present matter, as the parties in Kalamazoo, like ABC in the present case, were seeking a declaratory action to evaluate the appropriateness of their actions in light of a statute which included criminal penalties and affected their business operations. In fact, when the Defendants cannot identify one legitimate reason why Kalamazoo should not apply to this matter, they ridiculously argue that Kalamazoo is different and inapplicable because the parties in Kalamazoo were, in effect, faced with a difficult decision between breaching a contract and violating a statute.

While the Defendants contend that the parties in the Kalamazoo case were faced with a "Hobson's choice between breaching a contract, on the one hand, and facing criminal liability on the other," Intervenors' brief in opposition, p 13, this statement is nothing more than a fabricated attempt to distinguish Kalamazoo and create a conflict where one does not exist. In the Kalamazoo case, the parties "[sought] guidance from [the] Court as to whether their *proposed*

hours of work schedule would run afoul of the act." Kalamazoo at 518. Thus, if the work schedule in question was merely a proposal, Defendants' suggestion that the Kalamazoo plaintiff was between a rock and a hard place is meritless, as the schedule would not have been implemented yet and would have had no binding effect on the parties.

However, even if the work schedule in Kalamazoo were, in fact, beyond the proposal stage, and created some obligation on the part of the employer, this fact does not, as the Defendants suggest, distinguish the Kalamazoo case from the present case. If the Kalamazoo parties were faced with a "Hobson's choice" of breaching a contract or violating the law, is not ABC also faced with a similar choice between bidding and participating on prevailing wage construction projects and violating the Prevailing Wage Act? Or perhaps ABC's "Hobson's choice" is foregoing their constitutional right not to be subjected to an unconstitutional statute, or choosing to work on prevailing wage projects to support their livelihood. Another "Hobson's choice" ABC faces is, according to the standard the Defendants have established, is whether ABC members should choose to subject themselves to criminal prosecution and, thus, create a sufficient case or controversy, or attempt to comply with the statute (vague as it is) and in doing so, forego their right to challenge the statute. If, as the Defendants contend, the justification for allowing the Kalamazoo parties to proceed with their declaratory action is the mere fact that they were faced with a "Hobson's choice," then applying the Defendants own logic, ABC must, in fact, be entitled to proceed with this declaratory action. The Defendants have failed to supply any logical basis for distinguishing the Kalamazoo case. This is surely because no logical reason exists, as the Kalamazoo case is directly applicable to this matter, and requires a finding that ABC has established a case or controversy in the present matter.

It is obvious that the Defendants are unable to distinguish the Sterling, Strager and Kalamazoo cases because those cases are directly applicable to the present matter and require a finding that ABC has presented a case or controversy. The Defendants do nothing more than create non-existent distinctions in their attempts to support the fictitious standard of "imminent prosecution" for declaratory actions, and in their attempts categorically classify cases without "imminent prosecution" as representing hypothetical injury.[6] In fact, not only are the Defendants unable to distinguish applicable cases, they cannot provide this Court with even a shred of case law which does support their position. When reviewing the cases relied upon by the Defendants to support their position that imminent prosecution is the appropriate standard, their desperation rises to an absurd level. Although the Defendants would apply an "imminent prosecution" standard to ABC, ***not a single case cited by the Defendants to support their position involves a criminal statute or potential criminal prosecution!*** [7]

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[6] This hypothetical injury standard is particularly erroneous in light of ABC's claim that the Prevailing Wage Act represents an unconstitutional delegation of legislative authority. The U.S. Supreme Court has held that to establish standing to challenge an unconstitutional statute, a construction contractor Plaintiff like ABC ". . . need only demonstrate that it is ready and able to bid on contracts, and that a discriminatory policy prevents it from doing so on an unlawful basis." Northeastern Florida Contractors v Jacksonville, 508 US 656; 124 L Ed 2d 586, 113 S Ct 2297 (1993). Similarly, the Fourth Circuit has held, and the U.S. Supreme Court has affirmed, that

> one need not comply with an act if it be unconstitutional, and should not be required to abandon what he believes to be his right because a mistake in judgment in that regard might be ruinous to him. . . . [T]here is unquestionably an actual controversy between the parties entitling complainant to relief under . . . the Declaratory Judgment Act.

Wallace v Currin, 95 F2d 856 (4th Cir 1938), aff'd 306 US 1, 59 S Ct 379, 83 L Ed 441 (1939). Thus, the mere fact that ABC members are forced to surrender their right to be free of unlawful delegation of legislative authority in order to participate in prevailing wage projects constitutes a legally cognizable injury.

[7] See Defendant Wilbur's brief in opposition, citing McGill v Automobile Association of Michigan, 207 Mich App 492 (1994) (addressing the payment of medical bills under the No-Fault Act); Lee v Macomb County Board of Commissioners, 464 Mich 726 (2001) (addressing the funding of a veteran's relief fund pursuant to the Soldiers' Relief Fund Act); McLeod v McLeod, 365 Mich 25 (1961) (addressing an *in terrorem* clause in relation to an oral contract). Recall Blanchard Committee v Secretary of State, 146 Mich App 117 (1985) (addressing validation of signatures on recall petitions). These cases have absolutely no bearing on the criminal statute in question.

Defendant Wilbur and the Intervenors both rely upon BCBSM v Governor, 422 Mich 1 (1985) (challenging insurance legislation which was not yet enacted, and which did not contain any criminal sanctions). Defendants'

The fact that the Defendants are unable to produce a single case involving a criminal statute to support their position that "imminent prosecution" is the appropriate standard to be applied to this case speaks volumes regarding the validity (or lack thereof) of their arguments in this case. Contrary to the very weak showing presented by the Defendants, ABC has produced an abundance of case law directly on point and all involving plaintiffs, like ABC, who have brought declaratory actions challenging the constitutionality of the prospective enforcement of a criminal statute. ***Even more significant, however, for purposes of this court's consideration, is that each of the cases relied upon by ABC have all held that a plaintiff need notwait until prosecuted before instituting a declaratory action.*** *See* Sterling, *supra*, at 513; Strager, *supra*, at 179; and Kalamazoo, *supra*; at 517.

Against the great weight of controlling case law presented by ABC, the Defendants attempt to support their position concerning the necessity of "imminent prosecution" upon, of all things, a case based on probate law! Defendant Wilbur's Brief in Opposition, p 12, *citing* McLeod v McLeod, 365 Mich 25 (1961). How this case could possibly have any bearing whatsoever on the issues presented by the present case simply escapes comprehension. None of the parties in any of the cases presented by the Defendants faced even the remotest possibility that they could be incarcerated as a result of their actions. None of the parties in any of the cases presented by the Defendants were faced with a choice between continuing their livelihood or the possibility of inadvertently breaking the law. And none of the parties in any of the cases presented by the Defendants were faced with a statute that was so vague, so incomprehensible, that they simply could not discern what actions were required to comply with the law. The fact that the Defendants would utilize these cases to support their arguments in this case demonstrates

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reliance upon BCBSM in the present case is wholly without merit, as presented in greater detail in ABC's Application for Leave to Appeal to this Court at pp 16-18.

their complete misunderstanding of applicable law and the distinction between a statute involving criminal sanctions and cases or controversies without criminal sanctions.

The Defendants continue with their folly citing inapplicable case law with their reliance upon City of Los Angeles v Lyons, 461 US 95, 103 S Ct 1660, 75 L Ed 2d 675 (1983). Not only does the Lyons case not involve a criminal statute, it doesn't even involve a statute at all! In Lyons, the plaintiff alleged that a Los Angeles police offer had rendered him unconscious through the use of an illegal choke hold during a traffic stop. The plaintiff sought to bar the police department from using choke holds in the future. In the Intervenors' brief, the Intervenors argue "[s]imilarly to Plaintiff here, the Plaintiff in Lyons alleged that he 'justifiably feared that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse.'" Intervenors' brief at 20 (citations omitted). For starters, the Lyons case did not involve a criminal statute, much less the threat of imminent criminal prosecution. Therefore, the seminal issue in the present case could not possibly have been addressed in the Lyons case. Comparing the plaintiffs in the Lyons case to ABC in the present case borders fantasy, underscoring Defendants' complete failure to comprehend the issues at play in this case.

The Lyons case is distinguishable from the present matter in another fundamental and crucial manner. Again, in Lyons, the plaintiff sought to bar the police department from utilizing a carotid artery choke hold after he had been rendered unconscious by an officer utilizing this procedure during a traffic stop. Lyons at 97. The plaintiff in Lyons could only demonstrate a past exposure to the conduct in question, and could not provide any reasonable assertion that he would be subjected to the police choke hold in the future. This was especially true in light of the fact that the Los Angeles Police Department placed a moratorium on the use of these choke

holds. Lyons at 100. Thus, there was no reason to believe that the plaintiff in Lyons would be subjected to the objectionable practices in the future. In contrast, however, ABC members have been forced to contend with the Prevailing Wage Act in the past, and, if they desire to continue working on state funded construction projects, must continue to contend with the Prevailing Wage Act in the future. Additionally, as ABC members have indicated their desire to bid on prevailing wage projects (*See* ABC's Appl., Exs. F, G), absent action by this Court or the Legislature, ABC members will, in fact, be forced to contend with the Prevailing Wage Act in the future. Unlike Lyons, ABC members have every reason to believe that they will be subjected to the unconstitutional provisions of the Prevailing Wage Act in the future. There is absolutely no similarity between these two cases. The mere fact that the Defendants have relied upon the Lyons case to argue their case highlights their inability to find any conceivable legal support which may even remotely support their arguments that imminent criminal prosecution is necessary, or that the harm alleged by ABC is hypothetical and, therefore, unworthy of attention by this Court.

The Defendants' legal arguments opposing ABC's application for leave to appeal are wholly without merit. Defendants have failed to even address the issue of the Court's ability to provide litigants with direction as to their future actions in a declaratory action, let alone provide any legal precedent which would bar ABC from pursuing a declaratory action in this case. Rather, the Defendants have sought to divert attention from the real issue in this case by characterizing this case as one involving "hypothetical" injury. This simply is not true. ABC members seek clarification and direction regarding their rights and responsibilities under the Prevailing Wage Act to prevent violation of the law. Furthermore, ABC members wish to have judicial review of the constitutionality of the Prevailing Wage Act without incurring criminal

penalties inherent should they willfully violate the act to get the issue before the court. Extensive case law supports ABC's position that this case does present an actual cause or controversy, and that the Court of Appeals committed error in its determination in this case. Accordingly, ABC's Application for Leave to Appeal should be granted by this court.

case should be granted.

II. ABC's Claim That the Court of Appeals Erred in First Finding That it Lacked Jurisdiction and Then Proceeding to Comment Upon the Viability of ABC's Constitutional Claims is not Frivolous

The Defendants assert that the Court of Appeals acted properly in making pronouncements on the substantive issues involved in this case, despite the fact that it found that it lacked jurisdiction to decide the claims. After determining that it lacked jurisdiction, the Court of Appeals nonetheless engaged in a lengthy discourse regarding the viability of ABC's constitutional challenges to the Prevailing Wage Act. Although the Defendants characterize ABC's objection to this practice as "frivolous," the fact is that by engaging in such conduct the Court of Appeals is permitted to engage in extra-judicial evaluation and analysis of claims and sway the course of future litigation.

It is well settled that if a court lacks jurisdiction, any action taken with regard to the case, other than to dismiss it, is absolutely void. Fox v Board of Regents of the University of Michigan, 375 Mich 238 (1964); EDS v Township of Flint, 253 Mich App 538 (2002); Lehman v Lehman, 312 Mich 102 (1945); Bowie v Arder, 441 Mich 23 (1992). Therefore, upon a finding that it lacked jurisdiction over the present controversy, the Court of Appeals should have gone no further than to dismiss the case. In spite of this fact, the Court of Appeals made evaluations regarding ABC's constitutional challenges to the Prevailing Wage Act, even going so far as to find that the challenges must fail. Opinion, FN 7.

While the Court's opinions in this case, absent jurisdiction, are characterized as *dicta*, Defendants' argument that they, therefore, lack any weight whatsoever is not correct. Although *dicta* does not have precedential effect, the fact is that *dicta* has been routinely utilized in the formation of subsequent case decisions when the Court is faced with novel or complicated issues of law. *See* Attorney General v Public Service Commission, 429 Mich 248 (1987); White v Beasley, 453 Mich 308 (1996), Williams v Polgar, 391 Mich 6 (1973); Dyer v Trachtman, 255 Mich App 659 (2003). Therefore, *dicta* may have a persuasive effect on the outcome of future litigation.

In the present case, the Court of Appeals should not be permitted to engage in *dicta* which could impact future litigation when it lacked jurisdiction over the controversy. The Court of Appeals did not merely make insignificant comments about some trivial aspect of the present case; rather, it made substantive determinations regarding the viability of constitutional challenges to the prevailing wage statute. If, in fact, the Court of Appeals lacked jurisdiction over the claim, it should have exercised judicial restraint and terminated its opinion with that finding, rather than engaging in a review of the validity of the claims in this case. The Court of Appeals should not be permitted to sway future litigation through its pronouncements in this case, and to object to the Court's disregard for judicial boundaries is not "frivolous."

If the Court of Appeals wishes to make substantive determinations regarding the constitutionality of the Prevailing Wage Act, it must do so within the bounds of its jurisdiction. Absent jurisdiction, the Court of Appeals committed error which warrants Supreme Court review. Therefore, ABC's Application for Leave to Appeal should be granted.

CONCLUSION

The Defendants have failed to produce any legitimate reason to deny Plaintiff's Application for Leave to Appeal. In fact, their briefs in opposition to Plaintiff's Application consist almost entirely of a mischaracterization of the facts and law involved in this controversy. The Defendants have inappropriately relied upon an "imminent prosecution" standard to provide declaratory relief, which is unsupported by case law. Furthermore, the Defendants have failed to provide any argument whatsoever which addresses the standard applicable to ABC's unconstitutional delegation of legislative authority claim. For the reasons stated above, ABC's Application for Leave to Appeal should be granted.

Dated this 26th day of November, 2003.

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